SUPREME COURT, U. S.

No. 73-913

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Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH M. DEBICOLA,
Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AND THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE UNIONS

J. ALBERT WOLL
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

GERRY M. MILLER
6th Floor - Midland Bank Bldg.
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Attorneys for the Unions

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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-911

JOSEPH M. DRISCOLL,
Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 139, AND THE INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE UNIONS

The opinions below, the basis of this Court's jurisdiction, and the constitutional and statutory provisions involved are set out at pp. 1-3 and 1a-31a of the petition.

QUESTIONS PRESENTED

1) Whether a private suit challenging the legality of a union rule requiring candidates for office to file "non-communist" affidavits is cognizable under Title I of the Labor Management Reporting and Disclosure Act of 1959, even though the suit is "basically relat[ed] * * * to eligibility of candidates for office," (*Calhoon* v. *Harvey*, 379 U.S. 134, 141).

2) Whether the LMRDA, which, as enacted, prohibited members of the communist party from holding union office

(see § 504 since ruled unconstitutional in *United States* v. *Brown*, 381 U.S. 437), also prohibited unions, through § 101(a)(2), from requiring candidates for office to file "non-communist" affidavits.

3) Whether the decision of a union to utilize a "non-communist" affidavit, is "state action" subject to direct judicial supervision pursuant to the provisions of the Constitution of the United States, or private action subject to state and federal legislative regulation.

4) Whether, if the Constitution is directly applicable here, the "non-communist" affidavit utilized by these Unions is constitutional.

ARGUMENT[1]

The petition, as we now show, requests further review: of a narrow question, decided in principle by this Court in *Calhoon* v. *Harvey*, 379 U.S. 134, and as to which there is no conflict in the circuits, concerning the interrelationship between Titles I and IV of the LMRDA; and of a question concerning the scope of the "state action" concept that is of minimal practical import since it turns on the present effects of a provision (§ 504 of the LMRDA) no longer

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[1] This case was decided on a stipulation of facts between the parties. The petition's statement of the case (Pet. 3-7) sets out the essence of that stipulation accurately with one exception: nothing in the record supports the assertion (Pet. 4) that Local 139's revision of its original affidavit was based on a "recogni[tion]" that that affidavit suffered from "constitutional infirmities." With this one caveat we, therefore, accept the petition's statement of the case.

operative (see *United States* v. *Brown*, 381 U.S. 437), and concerns the exercise of a right rarely exercised (to require candidates for union office to file a "non-communist" affidavit). In addition the petitioner asks this Court to decide in the first instance, two further questions, which the courts below did not reach since they concluded that federal jurisdiction had not been established, which, for the reason just noted, are not of practical importance, as to which there is no conflict in the circuits, and which are, in any event, plainly insubstantial.

I

A. *The Court Below Read Calhoon* v. *Harvey, 379 U.S. 134, Correctly, And There Is No Conflict Between The Circuits.*

Title I of the LMRDA contains a "bill of rights of members of labor organizations" enforceable through private suits by those members. Title IV of the LMRDA, regulates union elections in detail and is enforceable through suits by the Secretary of Labor. In this case, both the District Court and the Court of Appeals, held (Pet. App. 3a-10a, 22a-25a), on the authority of *Calhoon* v. *Harvey*, 379 U.S. 134, that Title I does not confer jurisdiction where a union member attempts to reformulate what "in substance" is a Title IV challenge to the validity of an eligibility rule (here that members must complete a "non-communist" affidavit in order to run for office), into a complaint pursuant to § 101(a)(2), the "free speech" provision of Title I.

The petitioner claims:

"The first question presented in this petition is im-

> portant because clarification is needed of the scope of *Calhoun* v. *Harvey*, 379 U.S. 134 (1964), and because the issues and conflicts which this Court sought to resolve by its decision in *Calhoun* remain extant." Pet. 8.

The main buttress for this claim is the assertion that "there is a conflict between the court below and other circuits over the meaning of *Calhoon* v. *Harvey*." Pet. 13. There is no such conflict.

The two courts of appeals (the Second and Seventh Circuits) that have passed on the applicability of *Calhoon* to cases such as this, are in agreement that the contours of the principle there announced are precise and definite, and that the "issues and conflicts which this Court sought to resolve by its decisions in *Calhoon*," were there resolved and are no longer "extant."

As the petitioner acknowledges: "Although the rights protected by Title I and Title IV overlap to some extent, the remedies available under each Title differ markedly." Pet. App. 8. The harmonizing rule of *Calhoon* which fuses these disparate parts into a whole is that:

> "[W]e are satisfied that the Act itself shows clearly by its structure and language that the disputes here, basically relating as they do to eligibility of candidates for office, fall squarely within Title IV of the Act and are to be resolved by the administrative and judicial procedures set out in that Title." 379 U.S. at 141.

Obviously, "*Calhoon* did not prohibit Title I suits in the election area." *Clothing Workers Rank & File Committee*

v. *Amalgamated Clothing Workers*, 473 F.2d 1303, 1306 (C.A.3).[2] But, as the Second Circuit held in the case most heavily relied upon by the petitioner (Pet. 14), *Schonfeld* v. *Penza*, 477 F.2d 899, 904 (C.A.2):

> "The competing values between Title I rights and Title IV procedural requirements are best reconciled, in our opinion, by limiting initial federal court intervention to cases where union action abridging both Title I and Title IV can be fairly said, as a result of established union history or articulated policy, to be part of a purposeful and deliberate attempt by union officials to suppress dissent within the union. *Cf.* Navarro v. Gannon, *supra*, 385 F.2d at 520. We think that the allegations in the complaints here were sufficient to meet this test."

In the instant case the Seventh Circuit, quoted from, relied upon, and followed the *Schonfeld* approach. Pet. App. 6a-7a. It held, first, that here, as in *Calhoon*,

> "Since Driscoll's allegations 'basically relate' to eligibility and charge 'in substance' that he has been denied the right to run for office in his union, he is therefore stating a cause of action which can be enforced only under the provisions of Title IV calling for complaint to and suit by the Secretary of Labor as the exclusive remedy." Pet. App. 5a.

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[2] In *Clothing Workers*, the court did not go beyond this generalization because, as in *Calhoon*, 379 U.S. at 139, the Title I claims raised, on their own terms and without regard to Title IV, did not provide a basis upon which "to grant the relief requested." See 473 F.2d at 1307-1308.

And, second, that:

> "We find that the complaint of Driscoll in the instant case, although alleging the denial of Title I rights, is insufficient to invoke jurisdiction under the rationale of *Schonfeld*. The complaint does not allege that the candidacy requirement is part of a purposeful program of suppressing any expression of dissent by plaintiff. Nor does it appear that the eligibility requirement is a discriminatory, *ad hoc* device calculated to perpetuating certain individuals in office." Pet. App. 7a.

Thus, the "conflict" is one of *result* due to failure of the petitioner to meet the burden of proof imposed on him by *Schonfeld,* whereas the plaintiff in *Schonfeld* succeeded because he did meet that burden. It is not a conflict among the circuits as to the meaning of the statute within the scope of this Court's precedents.

B. *The Petitioner's Underlying Title I Claim Is Insubstantial.*

The court below having concluded that Title I did not confer jurisdiction did not treat with the petitioner's § 101(a)(2) claim on the merits. Pet. 19. He raises and argues that claim, nonetheless, on the ground that "were this Court to hear the jurisdictional issues, we believe it would promote judical efficiency for it to hear simultaneously the merits of the case." Pet. 19. The petitioner's position is that Congress in enacting § 101(a)(2) intended to prohibit "non-communist" affidavits such as that employed by the Unions. Pet. 19-20. We respond to his argument at this point to demonstrate its patent insubstantiality, since, if the underlying claim is without merit, there is no

point in further review of the jurisdictional issue posed.

> "If the words [of § 101(a)(2)] are read in complete isolation from their context in the Act, [the] interpretation [urged by the petitioner] is possible. However, 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisons of the whole law, and to its object and policy.' " *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270, 285. See also, e.g., *Musicians* v. *Wittstein,* 379 U.S. 171, 176; *Hodgson* v. *Steelworkers,* 403 U.S. 333, 336-338.

Looking to the "provisions of the whole law" we find that in § 504 of the LMRDA, Congress provided:

> "No person who is or has been a member of the Communist Party * * * shall serve * * * as an officer * * * of any labor organization * * * during or for five years after the termination of his membership in the Communist Party".

Moreover, § 504 was the successor to § 9(h) of the Labor Management Relations Act of 1947. Congress's deletion of the § 9(h) "non-communist affidavit" requirement, in favor of § 504, was not the product of the belief that such affidavits impermissibly invade individual rights. Section 9(h) was deleted because it "den[ied] a union access to the National Labor Relations Board [when] its officers did not file a proper report;" which sanction Congress concluded was "unwise * * * ineffective * * * unfair * * * [and] cumbersome." S. Rep. No. 197 on S. 155, 86th Cong. 1st Sess., at p. 9; 1 NLRB Legislative History of the LMRDA at p. 405. And § 504 was "adopted * * * as a more effective restriction against Communist infiltration of labor

organizations than is contained in subsection (h) of section 9 of the National Labor Relations Act, as amended." H. Rep. No. 741 on H. R. 8342, 86th Cong. 1st Sess. at p. 33; 1 Leg. Hist. at p. 791.

Against this background, to read § 101(a)(2) as embodying a Congressional intent to prohibit union rules providing for an affidavit affirming that a candidate is not presently a member of the Communist Party "knowing of and sharing in * * * [its] advocacy [of] * * * the overthrow of the United States Government by force or violence," is not to "reconstitute the gamut of values current at the time when the [statutory] words were uttered," (*Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 620, quoting L. Hand, J.), it is to abandon them.

II

A. *The Holding That The Unions' Action Complained Of Here Was Not "State Action" Is In Accord With The Principles Of Moose Lodge v. Irvis, 407 U.S. 163.*

In the lower courts, the petitioner, in support of his constitutional claim argued: first, that unions should be considered an arm of the state all of whose activities are subject to the "imposition of constitutional restraints," (Pet. App. 11a); and secondarily, that § 401(e) of the LMRDA and the fact that the Secretary of Labor refused to institute suit on his behalf demonstrated state involvement in the imposition of the "non-communist" affidavit (Pet. App. 12a). The Seventh Circuit, in proper reliance on *Moose Lodge* v. *Irvis*, 407 U.S. 163, 173, 175-176 & n. 3, rejected both these arguments. Pet. App. 10a-13a.

Continuing his search for "significant [state] involvement" in the alleged wrong (*Moose Lodge*, 407 U.S. at 173; compare, *Powe* v. *Miles*, 407 F.2d 73, 81 (C.A.2)), the petitioner now claims (Pet. 16-18), that the lower court's decision is inconsistent with *Moose Lodge* on the theory that there are provisions of federal law other than those he cited below that "place state sanctions behind" (407 U.S. at 178), the Unions' non-communist affidavit requirement: *viz*, § 504 of the LMRDA and § 9(h) of the LMRA.

But § 504 was declared unconstitutional by this Court nine years ago in *United States* v. *Brown*, 381 U.S. 437; and § 9(h) was repealed in 1959. Thus, neither can possibly be considered to be a source of "state sanction" for the Unions' rule. The petitioner's contention necessarily embraces the extravagant proposition that one who takes an action in conformity with law at the time in question, and continues that course as a matter of choice after the law ceases to be operative, is, and remains, for that purpose, an arm of state.[3]

B. *The Unions' Non-Communist Affidavit Is Constitutional.*

As was true with regard to the substantive § 101(a)(2) issue, the petitioner argues (Pet. 20-24) that his constitutional allegations provide a basis for hearing this case, despite the fact that both of the courts below (Pet. App. 13a-14a, 20a-22a) concluded that there was no "state

[3] *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (C.A.4) cert. denied 376 U.S. 939, has nothing to do with the issues in this case. The force of the statute (the Hill-Burton Act) relied upon there to show "state action" had not long previously spent itself. It was operative at the time of the litigation and would have continued operative but for the decision in *Simkins*.

action," and therefore declined to rule on the merits of his claim. Once again, however, this argument serves to demonstrate the petition's lack of merit.

The Chief Justice has emphasized that:

> "[T]he Court [has] sustained inquiry into • • • associational activities [where] it was narrowly confined to organizations that the individual had known to have the purpose of violent overthrow of the government and whose purpose the individual shared." *Cole* v. *Richardson*, 405 U.S. 676, 680.

The Unions' "non-communist" affidavit meets these requirements.[4] It reaches only present membership in the "Communist Party or other organizations that advocate the overthrow of the United States Government by force or violence." The explicit reference to the Communist Party is proper in light of the decision in *Scales* v. *United States*, 367 U.S. 203. And the fact that only present membership is involved insures that "individuals [will not have] to reach back into their pasts to recall minor, sometimes innocent, activities." *Cole*, 405 U.S. at 681. Moreover, membership *per se* is not enough, only membership "knowing of and sharing in such advocacy" and for the purpose of "acting pursuant to the teaching that the • • • Government should be overthrown by such means" is proscribed.

And, as the foregoing demonstrates, the petitioner's

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[4] "I swear that I am not a member of the Communist Party or other organization that advocates the overthrow of the United States Government by force or violence, knowing of and sharing in such advocacy and acting pursuant to the teaching that the United States Government should be overthrown py such means." Pet. App. 2a, n. 1.

argument that the affidavit is unduly vague and uncertain (Pet. 22-23), is most appropriately answered by the language of Mr. Justice Harlan quoted in *Cole*: "[A]lmost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel • • • [But here such an approach] amounts to little more than verbal calisthenics." 405 U.S. at 683-684. The petitioner's final point, that procedural due process requires a hearing before disqualification for failure to sign the affidavit (Pet. 23) is also rebutted by *Cole* where the Court stated: "All of the cases in this Court that require a hearing before discharge for failure to take an oath involved impermissible oaths." 405 U.S. at 686.

Thus, the instant case is wholly distinct from *Communist Party of Indiana* v. *Whitcomb*, —— U.S. ——, 42 L.W. 4129 (Jan. 9, 1974), where the Court overturned "a broad oath embracing advocacy of abstract doctrine as well as advocacy of action." *Id.* at 4131.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

J. ALBERT WOLL
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

GERRY M. MILLER
6th Floor - Midland Bank Bldg.
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Attorneys for the Unions

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